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No. 08-441

IN THE
SUPREME COURT OF THE UNITED STATES

JACK GROSS,

Petitioner,

v.

FBL FINANCIAL SERVICES, INC.,

Respondent.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

BRIEF OF *AMICI CURIAE* NATIONAL SCHOOL BOARDS ASSOCIATION IN SUPPORT OF RESPONDENT

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STATEMENT OF INTEREST OF AMICUS CURIAE

The National School Boards Association ("NSBA") is a not-for-profit federation of state school board associations from throughout the United States, the Hawaii State Board of Education and the Board of Education of the U.S. Virgin Islands. NSBA and the members of its federation together currently represent over 95,000 school board members who govern some 14,000 local school districts employing almost 6.4 million people.[1]

NSBA's mission is to foster excellence and equity in public education through school board leadership. As part of its mission, NSBA supports the reasonable application of anti-discrimination laws that balance the rights of public school employees with the educational and fiscal challenges facing public schools. In this case, NSBA seeks to provide the Court with concrete examples of employment decisions faced by public school districts in which a rule that placed the burden of proof on employers in a disparate treatment suit under the Age Discrimination in Employment Act, 29 U.S.C. § 623 (2008) ("ADEA") would hamper school districts' ability to accomplish their educational mission.

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[1] Pursuant to Supreme Court Rule 37.6, no part of this brief was authored by counsel for any party, and no person or entity other than *amicus curiae*, its members, or its counsel made a monetary contribution to the preparation or submission of the brief. This brief is filed with the written consent of all parties pursuant to Rule 37.3(a); the requisite consent letters have been filed with the Clerk of this Court.

School districts employ a variety of sensible employment criteria designed to improve educational achievement. Some employment decisions may favor employees with more current and relevant training and experience, who may be younger, but such employment decisions should not be deemed discriminatory where a district was not actually motivated by age.

SUMMARY OF THE ARGUMENT

The Court's decision in this matter will establish the burdens each party carries in an age discrimination case. This decision will especially affect our nation's public schools, which employ more than six million workers.[2] Public schools must employ those equipped to use cutting edge strategies to teach our nation's children and whose salaries fit within an ever-shrinking budget.

To do so, school employers must take employment actions—such as hiring recently-trained or lower-paid teachers or prohibiting talented teachers with greater seniority from transferring out of poorly performing schools—that, although non-discriminatory, statistically may favor workers under 40. These decisions, whether in response to breathtaking budget cuts, federal mandates such as

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[2] *See* U.S. Department of Education, Institute of Educational Sciences, Digest of Education Statistics: 2007, Staff Employed in Public Elementary and Secondary School Systems, by Functional Area: Selected Years, 1949-50 Through Fall 2005 (2007), *available at* http://nces.ed.gov/programs/digest/d07/tables/dt07_077.asp?referrer=list.

No Child Left Behind, or a need for teachers trained in a new discipline, are necessary to serve our nation's children.

Shifting the burden to favor plaintiffs in age discrimination cases will inhibit schools from making these necessary choices. One purpose of employment law is to make whole victims of invidious discrimination, and another is to motivate employers to avoid discriminatory decisions. The law does not compel employers to establish certain workforce demographics, however. Shifting the burden in age cases to favor plaintiffs will create incentives for artificial demographic balance as litigation prevention. By allowing a shifting of the burden of proof in an age discrimination matter, as Petitioner requests, the Court will render schools more vulnerable to unfounded discrimination claims challenging decisions not motivated by discrimination that statistically favor workers under 40. Accordingly, shifting the burden to favor plaintiffs in these cases will force school boards to choose between taking actions to promote student achievement and actions to avoid employment litigation. Such a shift will hinder schools in making non-discriminatory decisions in the best interests of America's children.

To prevent this outcome, this Court should clarify its anti-discrimination doctrine by holding that to prevail in an age discrimination case, a plaintiff must prove that age was the but-for cause of a challenged employment decision. This rule best honors the statutory text, the conventional rules of civil litigation, and the interest in preserving

employer autonomy to make non-discriminatory management decisions.

Alternatively, should the Court find that in some instances burden-shifting is appropriate, the rule requiring plaintiffs to present direct evidence of discrimination before obtaining a mixed motive jury instruction in non-Title VII cases, set out by Justice O'Connor's controlling opinion in *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), should be preserved. Doing otherwise and ruling as Petitioner requests would impose on public school boards a heavy burden to make overly prophylactic employment decisions to the detriment of our children's education.

I. To Preserve the Balance Required for American Public Schools to Serve Students, This Court Must Require Plaintiffs to Carry the Burden of Proving Invidious Discrimination.

The Court's decision in this case will impact our nation's public schools' ability to carry America's children into the Twenty-First Century. The demands facing public schools sometimes require employment practices that statistically favor workers under 40, such as stopping the flight of experienced teachers from high-needs schools, hiring recently-trained administrators, or replacing higher paid teachers with lower paid ones. While not motivated by age discrimination, these practices often result in greater benefits to younger workers, making schools vulnerable to unfounded claims of disparate treatment. The cost of that litigation deters school boards from making decisions

necessary to boost student achievement. Schools should have the flexibility to govern in non-discriminatory ways that best serve our nation's children. For this reason, this Court should not impose on defendants the unusual and onerous burden of proof of causation promoted by Petitioner.

The ADEA prohibits employers from taking an adverse employment action against an individual "because of" the individual's age. 29 U.S.C. § 623(a) (2008). This case calls on the Court to determine the burden a plaintiff must meet in showing an action was taken "because of" age. This is an issue of causation.

Nowhere in the language of the ADEA did Congress place upon employers the burden to disprove causation. This Court has made clear in the age discrimination context that "a disparate treatment claim cannot succeed unless the employee's [age] played a role in the process *and had a determinative influence on the outcome*." *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 610 (1993) (emphasis added). And the burden of proving that age was a determinative influence is the plaintiff's alone. *Tex. Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 253 (1981) (the burden of proving intentional discrimination "remains at all times with the plaintiff"). Accordingly, to prevail on an age discrimination claim, a plaintiff must show that age was the but-for cause of the challenged employment decision.[3] This rule best safeguards the balance

[3] This standard reflects this Court's command that conventional rules of civil litigation apply to federal employment discrimination statutes, including the ADEA.

between permitting plaintiffs to prove invidious discrimination where it exists and respecting employers' autonomy to make policy decisions unmotivated by discriminatory animus.

Preserving this balance is especially important in the context of age discrimination. This Court has explained, "it is not surprising that certain employment criteria that are routinely used may be reasonable despite their adverse impact on older workers as a group." *Smith v. City of Jackson*, 544 U.S. 228, 233 (2005), *quoted in Meacham v. Knolls Atomic Power*, 128 S. Ct. 2395, 2406-07 (2008). Because employment benefits commonly increase with seniority, "many employer decisions that are intended to cut costs or respond to market forces will likely have a disproportionate effect on older workers." *Smith*, 544 U.S. at 259 (O'Connor, J., concurring). Thus, this Court has observed Congress's recognition of the "distinctive nature of age discrimination, and the need to preserve a fair degree of leeway for employment decisions with effects that correlate with age." *Meacham*, 128 S. Ct. at 2406-07. Public school employers need this "leeway" to make non-discriminatory employment decisions that best serve students.

Meacham, 128 S. Ct. at 2406 ; *Desert Palace, Inc. v. Costa*, 539 U.S. 90, 99 (2003).

II. Alternatively, If The Court Finds That Burden-Shifting Is Appropriate In Some Instances, The Court Must Require Plaintiffs to Present Direct Evidence Of Discrimination To Obtain A Mixed-Motive Instruction In ADEA Cases.

Even if this Court finds that in some instances it is appropriate to shift the burden in an ADEA case, the rule requiring plaintiffs to present direct evidence of discrimination to obtain a mixed-motive instruction should be preserved. In *Price Waterhouse v. Hopkins*, Justice O'Connor wrote concurring in the judgment that to obtain a mixed-motive instruction in a disparate treatment case—thereby shifting the burden to the employer to prove it would have taken the disputed employment decision absent consideration of the protected characteristic—a plaintiff must "show by direct evidence that an illegitimate criterion was a substantial factor in the decision." 490 U.S. at 276. Justice O'Connor's concurrence, as the narrowest opinion of the Court, is the governing opinion in *Price Waterhouse*.[4]

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[4] *See Keller v. Orix Credit Alliance, Inc.*, 130 F.3d 1101, 1113 (3d Cir. 1997) (Alito, Circuit Justice). This view of Justice O'Connor's opinion reflects the Court's discussion in *Marks v. United States*, stating: "When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, the holding of the Court may be viewed as that position taken by those Members who concurred in the judgment on the narrowest grounds." 430 U.S. 188, 193 (1977). Although the Court has cast doubt on the *Marks* "narrowest grounds" test in certain cases, *see Grutter v. Bollinger*, 539 U.S. 306, 325 (2003), *Marks* remains this Court's most direct

Justice O'Connor's "direct evidence" requirement recognizes the danger in straying too far from this Court's well-settled rule that a disparate treatment plaintiff "bears the burden of persuasion throughout the litigation." *Id.* at 270. While basing an employment decision on a protected characteristic like age harms both the individual and society, employment discrimination laws are not aimed at *requiring* a certain demographic balance in the workforce. Shifting the burden allocation in an ADEA case in the manner Petitioner proposes would have the practical effect of doing just that. Justice O'Connor's *Price Waterhouse* concurrence, while imperfect, nonetheless recognizes the critical balance employment discrimination laws must strike between eradicating invidious discrimination without forcing employers to engage in what this Court has termed "inappropriate prophylactic measures" overcompensating for non-discriminatory disparities. *Id.* at 274 (citation omitted).

III. Shifting Burdens To Favor Plaintiffs In ADEA Cases Will Undermine Our Schools' Ability To Serve Public School Students.

Public schools must prepare our children to be productive citizens and competitors in an increasingly global marketplace. Thus, they face the challenge of improving achievement while anticipating and meeting the unique needs of the changing population of school children. School

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guidance for interpreting decisions when no majority adopts a given reasoning.

boards must employ and retain those who possess current skills and are therefore best able to meet these requirements. Shifting burdens to favor plaintiffs in ADEA cases will inhibit schools from making non-discriminatory employment decisions that best serve students.

A. America's Schools Must Do More With Less.

1. Public Schools Must Meet Numerous State and Federal Mandates in Serving America's Children.

Public schools face unprecedented and unrelenting challenges in meeting the demands of the Twenty-First Century. Some of these challenges arise from federal and state laws requiring both increased student achievement and specialized instruction for those who most need it. Not the least of these challenges is the No Child Left Behind Act of 2001 ("NCLB"), which aims to "ensure that all children have a fair, equal, and significant opportunity to obtain high-quality education and reach, at a minimum, proficiency on challenging State academic assessments." 20 U.S.C. § 6301 (2009).[5] Likewise, the Individuals with Disabilities

[5] This goal is measured primarily through student attainment of adequate yearly progress ("AYP") on state assessments. 20 U.S.C. § 6301(6). A school that fails to "make AYP" goals faces certain NCLB-specified sanctions, including the replacement of school staff determined to be "relevant" to the school's AYP failures. 20 U.S.C. § 6316(b)(7)(C)(iv)(I).

Education Improvement Act, commonly referred to under its pre-reauthorization name, IDEA, requires public schools to provide individualized free appropriate education to students with disabilities. 20 U.S.C. § 1401(3)(A) (2008). Similarly, the McKinney-Vento Homeless Assistance Act, 42 U.S.C. § 11431 *et seq.* (2009), requires public schools to meet the unique needs of homeless youth. Public schools must also help non-native English speaking students or English Language Learners ("ELLs") to overcome language barriers and participate equally in the educational program. *See* Equal Educational Opportunity Act of 1974, 20 U.S.C. § 1703 (2009); *see generally Lau v. Nichols*, 414 U.S. 563 (1974). These laws are a sampling of the federal and state programs that require schools to increase academic achievement overall and meet the unique needs of specific students.

School professionals must be equipped with a growing set of skills and qualifications to meet the staffing implications of these laws. For example, NCLB requires schools to hire teachers who are "highly qualified." Additionally, NCLB contemplates significant staffing changes in schools where student test scores have not met federal standards. To implement NCLB, school administrators must be better versed in testing, instruction strategies, curriculum formation, and data analysis than ever before.[6] Additionally, to comply with specialized

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[6] Kevin Butler, *Principal Preparation Programs: Equipping School Leaders for New Pressures and Challenges*, DISTRICT ADMINISTRATION, Sept. 2008, *available at* www.districtadministration.com/viewarticlepf.aspx?articleid.=1679.

instruction requirements, teachers must be able to differentiate instruction for students with disabilities, ELLs, and others. These staffing demands are immediate and constantly growing. For example, as public schools increasingly serve ELLs,[7] schools need more teachers trained in specific research-based ELL teaching strategies.[8] Schools have also observed growth in the percentage of students requiring special education[9] whose unique educational needs demand attention from school professionals well-trained in specific strategies for serving them. Accordingly, employing school teachers, administrators, and other personnel equipped to meet these growing challenges is one of the most important goals of our nation's schools.

2. Many schools face serious reductions in funding and resources.

While schools face increasing and changing demands in serving students and meeting performance benchmarks, they must do so against a

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[7] *See generally* Christopher B. Swanson, PERSPECTIVES ON A POPULATION: ENGLISH-LANGUAGE LEARNERS IN AMERICAN SCHOOLS 3 (2009), *available at* http://www.edweek.org/products/qc/pop/qc09-pop.pdf. English Language Learners bring many benefits to the classroom but also commonly have unique educational needs.

[8] *See id.*

[9] The percentage of public school students qualified for special education services grew from 8% in 1976-77 to nearly 14% in 2004-05. United States Department of Education Institute of Education Sciences, Digest of Education Statistics, Table 49 (2007), *available at* http://nces.ed.gov/programs/digest/d07/tables/dt07_049.asp.

backdrop of diminishing resources and soaring costs. Many public school districts currently face reduced budgets and will likely continue to face reduced budget in the near future that will force substantial cuts in school expenditures.[10] At the same time, many districts struggle with higher fuel or food prices, or increasing insurance costs.[11]

These budget challenges are due to several influences, including the collapse of the nation's housing market, that have led to decreased property values. This crisis directly affects many districts that draw their primary financial support from local property taxes. Several states have also announced budget cuts for school funding.[12] This financial strain is exacerbated by soaring enrollment figures in some districts[13] and plunging enrollment in others.[14] Reductions in enrollment cause reductions

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[10] For example, the Miami-Dade County Public Schools and the Detroit County Public Schools face reduced budgets for the 2008-09 school year. Angela Pascopella, *A Perfect Storm: Annual School Spending Report*, DISTRICT ADMINISTRATION, Sept. 2008, *available at* www.districtadministration.com/viewarticlepf.aspx?articleid=1673.

[11] *See* Pascopella, *supra* note 10. *See also* Christopher Hann, *The Superintendents Speak*, DISTRICT ADMINISTRATION, Sept. 2008, *available at* www.districtadministration.com/viewarticlepf.aspx?articleid.=1674.

[12] *Id.* In California, for example, Governor Schwarzenegger has proposed cutting state education funding by $ 2.5 billion. *See* Leslie Postal & Aaron Deslatte, *Crist Warns of Possibility of More School Budget Cuts*, ORLANDO SENTINEL, Feb. 12, 2009, *available at* http://www.orlandosentinel.com/news/education/orl-morecuts1209feb12,0,2029514.story; EDUCATION COMMISSION OF THE STATES, ECS STATE NOTES ON STATE BUDGET SHORTFALLS: EXAMPLES OF STATE RESPONSES, Feb. 2009, *available at* www.ecs.org.

[13] Pascopella, *supra* note 10.

[14] *Id.*; Amanda Ripley, *Rhee Tackles Classroom Challenges*, TIME, Nov. 26, 2008 (observing that if students continue to leave the Washington,

in state funding, and those losses can be disastrous where a district must continue to pay fixed costs, such as building and ground maintenance, employee payroll and health insurance, and other expenditures not paid on a per-student basis.[15]

Financial woes have required many districts to consider staffing reductions, as a school's greatest expense is often personnel.[16] Accordingly, schools increasingly require teachers who not only provide cutting edge instruction, such as data-driven education of ELLs and students with disabilities, but also whose salaries fit reasonably within the ever-shrinking budget of the public schools.

D.C. schools at their current rate, "enrollment will drop 50% every ten years").

[15] Pascopella, *supra* note 10.

[16] *Id.* A potential $1.4 billion shortfall facing the New York City Public Schools may require a layoff of 15,000 teachers in 2009-10. Elissa Gootman, *Klein Implores Legislators to Reduce Cuts to Schools*, NEW YORK TIMES, Jan. 29, 2009, *available at* www.nytimes.com/2009/01/29klein.html. Additionally, state budget cuts and other financial woes may lead to layoffs in other states. *See* Berny Morson, *Math Problem for Schools: Get by with $125 Million Less*, ROCKY MOUNTAIN NEWS, Jan. 27-28, 2009, *available at* www.rockymountainnews.com/news/2009/jan/27/budget-ax-will-hit-schools/; Associated Press, *Largest N.C. School System May Cut 1200 Jobs*, NEWS & RECORD, Feb. 13, 2009, *available at* http://www.news-record.com/content/2009/02/13/article/largest_nc_school_system_may_cut_1200_job.

B. To Do More With Less, Schools Must Make Policy-Based Decisions That Lack Discriminatory Motive But Statistically May Favor Individuals Under 40.

1. Schools' decisions to hire recently-trained teachers and administrators are based on educational judgments.

The nature of student demographics and the role of public education in preparing students for the workforce are continually changing and so must the skills teachers need to meet these challenges. Because teacher preparation programs are responsive to these changes and arm future educators with cutting edge skills, school employers may make employment decisions favoring recently-trained educators or educators who have kept their skills current.

Because recently-trained educators are statistically more likely to be under 40, a preference for them may adversely affect older educators, but this preference is driven by legitimate educational interests, not discriminatory motives.[17] Thus, an

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[17] NATIONAL CENTER FOR EDUCATION STATISTICS, SPECIAL ANALYSIS 2005: MOBILITY IN THE TEACHER WORKFORCE (2005), *available at* http://nces.ed.gov/programs/coe/2005/analysis/index.asp (noting average age of new teachers in 1999-2000 was 29); C. EMILY FEISTRITZER, THE MAKING OF A TEACHER: A REPORT ON TEACHER PREPARATION IN THE UNITED STATES (1999), *available at* http://www.ncei.com/MakingTeacher-rpt.htm (noting average age of students preparing to teach at the undergraduate level is 22).

ADEA plaintiff who complains of a younger, more recently-trained colleague being given a promotion or who demonstrates a mere statistical preference for recently-trained teachers should not be permitted to shift the burden of persuasion to a defendant school employer. Rather, as conventional standards of proof dictate, the employee must prove an adverse employment decision was made *because of* age.

Deviating from the conventional burden allocation standards in ADEA cases will deter school employers from making employment decisions that, while educationally-based, result in an unintended age disparity. Moreover, even if this Court determines it is appropriate to shift the burden of persuasion in mixed-motive cases, this Court should preserve Justice O'Connor's *Price Waterhouse* standard, which requires direct evidence of a decision-maker's reliance on illegitimate criteria. Adopting the Petitioner's recommended allocation of burdens will increase schools' vulnerability to unfounded age discrimination claims and will ultimately discourage schools from seeking recently-trained educators.

a. Teachers who have recently completed teacher preparation programs are often better trained to teach English Language Learners.

In recent years, the population of English Language Learners in public schools has increased

substantially.[18] The challenge of providing effective instruction to ELLs is not new, but has been made more urgent by NCLB requirements that demand improvements in the performance of this student subgroup on assessments and statistics showing a disparity between the performance of English Language Learners and non-English Language Learners.[19]

To meet these challenges, teacher preparation programs have begun to offer ELL teacher certification that comprehensively trains teachers in the most innovative methods and strategies for teaching these students.[20] In light of the specialized

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[18] JEANNE BATALOVA, MICHAEL FIX, & JULIE MURRAY, MEASURES OF CHANGE: THE DEMOGRAPHY AND LITERACY OF ADOLESCENT ENGLISH LEARNERS – A REPORT TO CARNEGIE CORPORATION OF NEW YORK 23 (2007), *available at* http://www.carnegie.org/literacy/pdf/Measures_of_Change.pdf (estimating ELLs comprise approximately 10.5% of the total school age population); Tracy Gray & Steve Fleischman, *Research Matters: Successful Strategies for English Language Learners*, 62 EDUCATIONAL LEADERSHIP, 84-85 (Dec. 2004/Jan. 2005), *available at* http://www.ascd.org/publications/educational_leadership/dec04/vol62/num04/Successful_Strategies_for_English_Language_Learners.aspx (projecting ELLs will comprise 50 percent of the student population by 2015).

[19] *See* BATALOVA, *supra* note 18 at 40 (noting that only four percent of 8th grade ELL students scored proficient (or above) in reading on the National Assessment of Educational Progress (NAEP) test compared with 30% of non-English Language Learners).

[20] *See, e.g.*, Eamonn O'Donovan, *Staff Development for Teachers of English Language Learners: Project GLAD Encourages Teachers in a Comprehensive Model*, DISTRICT ADMINISTRATION, Nov. 2008, *available at* http://www.districtadministration.com/viewarticle.aspx?articleid=1749 (discussing effectiveness of project-based learning in working with ELLs); ASTA SVEDKAUSKAITE, CRITICAL ISSUE: USING TECHNOLOGY TO

skills needed to work with ELLs, school districts must employ teachers well-equipped to meet these challenges. Many of these teachers will be recently trained and under the age of 40. The correlation between age and recent training should not deter school districts from making employment decisions that simply prefer teachers who have received a specific amount and kind of training.

b. Recently-trained teachers are prepared to teach technology and Twenty-First Century Skills.

Today's employers expect schools to equip students with the skills needed in a global workplace, including critical thinking, analytical, communication, and technological skill [21] Responding to this demand, policy-makers have taken steps to ensure students receive instruction in these skills.[22] In turn, teacher preparation programs

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SUPPORT LIMITED-ENGLISH-PROFICIENT (LEP) STUDENTS' LEARNING EXPERIENCES, NORTH CENTRAL REGIONAL EDUCATIONAL LABORATORY (2003), *available at* http://www.ncrel.org/sdrs/areas/issues/methods/technlgy/te900.htm (discussing use of technology to teach ELLs).

[21] *See* PARTNERSHIP FOR 21ST CENTURY SKILLS, 21ST CENTURY SKILLS, EDUCATION, AND COMPETITIVENESS: A RESOURCE AND POLICY GUIDE 10 (2008), *available at* http://www.21stcenturyskills.org/documents/21st_century_skills_education_and_competitiveness_guide.pdf.

[22] For instance, NCLB sets out expectations for improving technology literacy among students and for ensuring technology is integrated into the curricula of all schools. 20

provide training in methodologies effective in imparting Twenty-First Century skills and in integrating technology into the classroom.[23]

Because most teacher preparation programs require coursework in instructional or educational technology, [24] recently-trained teachers are well-prepared to promote technology literacy and to teach Twenty-First Century skills. To prepare students to

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U.S.C. § 6752. Some states have content standards specifically requiring instruction on Twenty-First Century Skills. *See, e.g.*, West Virginia Department of Education, Teach 21 Home, http://wvde.state.wv.us/teach21/. Other states have developed technology proficiency standards for teachers. *See, e.g.*, South Carolina Department of Education, Teacher Technology Proficiency (Proviso 1.25), http://ed.sc.gov/agency/offices/tech/teachprofprov/index.html; Virginia Technology Standards for Instructional Personnel, 8 VA. ADMIN. CODE § 20-25-10 *et seq.*, *available at* http://www.doe.virginia.gov/VDOE/Compliance/TeacherED/tech.html; IDAHO CODE ANN. § 33-1213.

[23] *See* Bob Pearlman, *New Skills for a New Century: Students Thrive on Cooperation and Problem-Solving*, EDUTOPIA, http://www.edutopia.org/new-skills-new-century; Stephen Sawchuk, *21st Century Skills Focus Shifts W. Va. Teachers' Role,* EDUCATION WEEK, Jan. 5, 2009, *available at* http://www.edweek.org/ew/articles/2009/01/07/16skills_ep.h28.html; Colleen Brondou, *Project-Based Education Prepares Students for 21st Century Challenges*, Sept. 3, 2008, http://www.findingdulcinea.com/news/education/september-08/Project-Based-Education-Prepares-Students-for-21st-Century-Challenges-.html.

[24] Steven B. Smith, *Technology 101: Integration Beyond a Technology Foundations Course*, 16 J. OF SPECIAL EDUC. TECH. 43-45 (Winter 2001), *available at* http://jset.unlv.edu/16.1T/tasseds/smith.html; L. Whetstone & A.A. Carr-Chellman, *Preparing Preservice Teachers to Use Technology: Survey Results*, 45 TECHTRENDS 11-17 (July/Aug. 2001).

compete in a global workplace, school districts must be able to hire and place the individuals who they believe are best qualified to teach these skills, regardless of seniority or a perceived adverse impact on older workers. Upholding conventional standards of proof, in which plaintiffs must show an adverse action was taken "because of" age, best supports school employers in making these educationally-based, non-discriminatory employment decisions.

c. Recently-trained educators are equipped with the skills needed to teach special education students.

Over the past 30 years, the number of public school students identified as having a disability has nearly doubled.[25] During this same period, the responsibilities placed on public schools to educate students with disabilities have grown and transformed.[26] Eligible children with disabilities are

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[25] NATIONAL CENTER FOR EDUCATION STATISTICS, FAST FACTS: CHILDREN 3 TO 21 YEARS OLD SERVED IN FEDERALLY SUPPORTED PROGRAMS FOR THE DISABLED, BY TYPE OF DISABILITY: SELECTED YEARS, 1976-77 THROUGH 2003-04 (2006), *available at* http://nces.ed.gov/fastfacts/display.asp?id=64 (approximately 3,694,000 children with disabilities were served in federally supported educational programs in 1976; by 2003 that number had increased to 6,634,000 children).

[26] Under NCLB, schools are evaluated based on the achievement of students with disabilities on standardized exams. Additionally, IDEA requires public schools to provide each eligible child with a disability an individualized education program and related services. *See* 20 U.S.C. §§ 1401(3)(A), 1414(d).

guaranteed an individualized education, which must occur to the maximum extent appropriate with the child's nondisabled peers. *Id.* § 1412(A)(5). Thus, teachers in "general education" classrooms increasingly must ably educate students with disabilities alongside their non-disabled peers. This means teachers must differentiate instruction to meet the needs of students with disabilities (including multiple students with disabilities in the same classroom) as well as their nondisabled peers. This requires all teachers—not just special education teachers—to be prepared for such a challenge.

Additionally, the field of special education is rapidly developing. For example, recent changes to IDEA modified the way schools determine whether a child has a learning disability to reflect a growing body of research showing "Response to Intervention," or RTI to be effective in diagnosing specific learning disabilities.[27] To educate each child with a disability under IDEA and to improve academic achievement of students with disabilities under NCLB, schools must employ special education teachers recently trained in the latest pedagogical innovations and general education teachers who can differentiate instruction. As the field of special education research grows, the best trained individuals often will be those recently trained.[28] To

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[27] U.S. DEPARTMENT OF EDUCATION, Q & A: QUESTIONS AND ANSWERS ON RESPONSE TO INTERVENTION (RTI) AND EARLY INTERVENTION SERVICES (EIS) (Jan. 2007), *available at* http://idea.ed.gov/explore/view/p/%2Croot%2Cdynamic%2CQaCorner%2C8%2C.

[28] Courses in instructing students with disabilities in general education classrooms are now staples of teacher preparation programs. *See, e.g.*, Indiana University, School of Education, Secondary Education English Language Arts Course

educate students with disabilities, schools must be free to hire those best trained to meet their needs without fear of increasing vulnerability to unfounded employment litigation.

d. Recently-trained teachers are likely to be trained to work with at-risk populations.

Public school districts are experiencing other demographic shifts, including staggering growth in the number of students living in poverty [29] and increases in student mobility, that have had a deep impact on student learning. [30] These student

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Requirements, http://education.indiana.edu/Portals/204/Language_Arts_January_2009.pdf (requiring "Teaching Students with Special Needs"); New York University Steinhardt School of Education, http://steinhardt.nyu.edu/teachlearn.olde/pdfs/English.pdf (requiring "Educating Students with Disabilities in General Education Classrooms").

[29] *See* Steve Suitts, *Crisis of the New Majority: Low-Income Students in the South's Public Schools*, SOUTHERN SPACES, Apr. 16, 2008, at 1, *available at* http://www.southernspaces.org/contents/2008/suitts/1a.htm (noting during the 2006-07 school year, 54% of the public school enrollment in Southern states were students from low income households); Press Release, Indiana Youth Institute, Increase in Indiana Child Poverty Nearly Doubles the U.S. Average (July 25, 2007), *available at* http://www.kidscount.org/datacenter/db_07pdf/pressreleases/IndianaPressRelease.pdf (noting 17% of Indiana children living in poverty in 2005).

[30] *See* Russell W. Rumberger, Student Mobility – The Extent of Student Mobility, The Impact of Mobility on Students, and the Causes of Mobility, http://education.stateuniversity.com/pages/2461/Student-Mobility.html (noting in Chicago public

populations present special challenges for teachers, especially in ensuring that these students do not drop out.[31]

Many schools of education have recently developed courses that provide intense training in teaching at-risk students.[32] Given the high stakes of educating at-risk students, school districts must be permitted to select and place the teachers whose training and experience best prepare them to serve these students. Because teachers who have recently completed teacher preparation programs are often given special training to help serve these populations, school districts with significant at-risk populations have legitimate non-discriminatory reasons for preferring these teacher candidates. Allowing an ADEA plaintiff employee who is adversely affected by this preference to shift the burden of persuasion on the issue of causation to the school employer fails to strike the balance sought by anti-discrimination legislation because it allows the plaintiff to use a simple correlation between age and recent training to create a burden-shifting inference of discrimination. This will force schools to over compensate for this correlation by hesitating to

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schools only 47% of the students remained in the same school over a four-year period).

[31] *Id.*

[32] *See, e.g.*, Duke University, Program in Education, http://www.duke.edu/web/education/courses/courselistings.html (offering course in "Motivation and At-Risk Students"); NATIONAL PARTNERSHIP FOR TEACHING IN AT-RISK SCHOOLS, QUALIFIED TEACHERS FOR AT-RISK SCHOOLS: A NATIONAL IMPERATIVE (2005), *available at* http://www.ecs.org/clearinghouse/57/96/5796.pdf (calling for research to help identify practices to place qualified staff in at-risk schools).

employ recently-trained educators despite desperately needing their skills to work with at-risk student populations.

2. Schools may more efficiently meet the requirements of NCLB by employing recently-trained teachers.

NCLB requires school districts to recruit and retain "highly qualified" teachers in all core academic subjects. 20 U.S.C § 6319(a)(2)(A) (2009). To meet the "highly qualified" requirement, a teacher must have a bachelor's degree, be fully licensed or certified, and demonstrate substantive competency in the subject taught. Teachers may demonstrate substantive competency by earning a major in the subject taught (or credits equivalent to a major), passing a state developed test, earning a graduate degree, or obtaining advanced certification in the subject taught. Because teachers who have recently completed teacher preparation programs will generally be deemed "highly qualified," school employers have legitimate educational reasons for preferring these teacher candidates [33] who have

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[33] NANCY FARNAN & DANA L. GRISHAM, LITERACY TEACHER PREPARATION: TEN TRUTHS TEACHER EDUCATORS NEED TO KNOW 102-113 (Susan D. Lenski, Dana L. Grisham, & Linda S. Wold, eds., 2005), *available at* http://www.reading.org/Library/OldRetrieve.cfm?bk588-10-farnan.pdf&D=10.1598/0872075885.10&F=bk588-10-Farnan.pdf (discussing continuum of teacher development and characterizing recently-trained teachers as "highly trained novices").

acquired competence both in content knowledge and instructional methodologies necessary to effective teaching.[34] School employers must be free to make these decisions without increasing their vulnerability to ADEA lawsuits.

3. Recently-trained administrators are equipped with the skills necessary to lead today's schools.

Like teachers, public school administrators face evolving challenges, so school districts' expectations for administrators today are very different than they were in the past. [35] Administrators are now expected to be instructional leaders,[36] as well as organizers, mobilizers, and

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[34] *See, e.g.,* Linda Darling-Hammond, *Access to Quality Teaching: An Analysis of Inequalities in California's Public Schools*, 43 SANTA CLARA L. REV. 1045, 1054-55 (2003)(explaining teachers must "understand the content their students are expected to learn, but also have a repertoire of teaching strategies to engender and support student understanding").

[35] *See generally*, INSTITUTE FOR EDUCATIONAL LEADERSHIP, LEADERSHIP FOR STUDENT LEARNING: REINVENTING THE PRINCIPALSHIP, SCHOOL LEADERSHIP FOR THE 21ST CENTURY INITIATIVE, A REPORT OF THE TASK FORCE ON THE PRINCIPALSHIP, Oct. 2000, *available at* http://www.iel.org/programs/21st/reports/principal.pdf (explaining how landscape has changed for school leaders and identifying reinvention strategies).

[36] *See generally* CHRISTOPHER MAZZEO, ISSUE BRIEF FOR THE NATIONAL GOVERNORS ASSOCIATION CENTER FOR BEST PRACTICES: IMPROVING TEACHING AND LEARNING BY IMPROVING SCHOOL LEADERSHIP, Sept. 12, 2003, http://www.nga.org/cda/

collaborative role models. Principal leadership programs are responding to these changes and are identifying innovative ways to train new administrators. Like employment decisions that favor recently-trained teachers, employment decisions that favor recently-trained administrators may adversely affect older workers. Because shifting the burden of proof to the employer will make it easier for plaintiffs to prevail in ADEA lawsuits, schools may seek to avoid such lawsuits by refraining from seeking recently-trained school leaders. This response undermines school employers' rights to make decisions lacking discriminatory motive and impedes school districts from accomplishing their goals.

4. School districts must be able to enact employment policies that put the right people in the right positions and cut down on salary expenditures.

School employment policies are traditionally seniority-driven.[37] But given the challenges facing

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files/091203LEADERSHIP.pdf (describing principal as organizer, entrepreneur, and instructional leader).

[37] *See, e.g.*, Collective Negotiations Contract between the Board of Education San Diego Unified School District and the San Diego Education Association (July 1, 2006 – June 30, 2008), at 50-51, 96, *available at* http://www.nctq.org.contracts/13.pdf (specifying layoffs by reverse seniority and establishing seniority as a factor in intra-district transfers); Agreement between the Board of Education of the City of Chicago and the Chicago Teachers Union, Local No. 1, American Federation of Teachers, AFL-CIO (July 1, 2007 – June 30, 2012), at 24, 31-32,

districts today, years of experience should not be the sole measure of an individual's performance as a teacher or administrator. A school district's workforce must be rich with individuals who possess the skills needed to effect change. Likewise, the school district must also be able to afford the workforce it employs. Building that workforce may require districts to set aside seniority rules and implement non-traditional staffing measures that may favor less-experienced, younger educators.

a. School districts must be able to use reductions-in-force to retain a work force that meet their needs.

Salary and benefit expenditures comprise most of a district's budget.[38] Thus, when districts are forced to make budget adjustments, cuts are typically made in salary expenditures, often through reductions-in-force (RIFs) that provide immediate financial relief. Many districts across the country have recently conducted RIFs due to shrinking

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41-42, *available at* http://www.nctq.org/contracts/4.pdf (giving preference to certain positions based on seniority and specifying layoffs and reappointments are based on seniority).

[38] *See generally* U.S. Department of Education, National Center for Education Statistics, Table 165: Summary of Expenditures for Public Elementary and Secondary Education, by Purpose: Selected Years, 1919-20 through 2004-05, *available at* http://nces.ed.gov/programs/digest/d07/tables/dt07_165.asp (noting in 2004-05, instruction costs were 52%, administration costs were 6.5%, and other school services were 18.3% of total expenditures).

budgets.[39] School districts may also use RIFs to mitigate fluctuations in student enrollment due to changes in student preferences, changes in the district's educational goals, or changes brought about by external demands, like NCLB.[40] For instance, because NCLB requires districts demonstrate progress in specific academic areas, many districts have increased instructional time in language arts and math, and reduced the amount of time for elective courses.[41] These curricular shifts

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[39] *See, e.g.*, Jason Song & Howard Blume, *LA Unified May Lay Off Almost 2,300 Teachers, Officials Say*, LOS ANGELES TIMES, Jan. 7, 2009, at 1, *available at* http://www.latimes.com/news/education/la-me-layoffs7-2009jan07,0,3675869.story; Nina Sears, *Dallas School District Fires 375 Teachers*, NEA TODAY, Oct. 24, 2008, at 1, *available at* http://blogs.nea.org/ednotes/2008/10/dallas-school-district-fires-375.html; The Associated Press, *Largest N.C. School System May Cut 1,200 Jobs*, NEWS-RECORD.COM, Feb. 13, 2009, *available at* http://www.news-record.com/content/2009/02/13/article/largest_nc_school_system_may_cut_1200_jobs.

[40] For instance, when a district experiences a particularly large influx of students at one particular level, it may need to hire additional staff. As those students move through the system and enrollment numbers return to pre-influx levels, the district may need to hire staff in the upper grades and reduce staff in the grades where the influx originally necessitated hiring. When this occurs, districts may be simultaneously hiring and RIFing employees.

[41] *See generally* JENNIFER MCMURRER, CHOICES, CHANGES, AND CHALLENGES: CURRICULUM AND INSTRUCTION IN THE NCLB ERA, CENTER ON EDUCATION POLICY REPORT FROM THE SERIES FROM THE CAPITAL TO THE CLASSROOM: YEAR 5 OF THE NO CHILD LEFT BEHIND ACT, Dec. 2007, *available at* http://www.cep-dc.org/_data/n_0001/resources/live/07107%20Curriculum-WEB%20FINAL%207%2031%2007.pdf (62% of districts reported increased instructional time for English language arts since the inception of NCLB and approximately 44% reported

may prompt school districts to eliminate underutilized positions.

In states that require collective bargaining, unions typically negotiate contracts insulating senior employees from dismissal in a RIF, such as through "last hired, first fired" provisions requiring districts to RIF newly-hired employees first.[42] However, nearly one-third of all states do not require collective bargaining.[43] In these states, school districts may decide to eliminate positions based upon educational judgments, not seniority rules.

When districts are free to make decisions driven purely by educational and business goals, a RIF may disproportionately affect a district's more experienced employees. First, eliminating the positions with the highest salaries is fiscally prudent. Because most school districts' salary structures reward employees with the highest levels of education and the longest tenure, the employees with the highest salaries are likely to be over 40.

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cutting time from subjects such as social studies, science, art and music, and physical education).

[42] *See, e.g.*, Collective Bargaining Agreement between the Seattle Public Schools and Seattle Education Association Certificated Non-Supervisory Employees (2004-2009), at 112-13, *available at* http://www.nctq.org/contracts/61.pdf; Teachers Employment Agreement between the United Teachers of Wichita and the USD 259 Board of Education (2008-2009), at 34, *available at* http://www.nctq.org/contracts/101-07.pdf.

[43] For instance, Texas, Georgia, South Carolina, North Carolina, and Virginia prohibit collective bargaining. Collective bargaining is permissible, but not required, in Arizona, Utah, Colorado, Wyoming, Louisiana, Mississippi, Arkansas, Missouri, Kentucky, Alabama, and West Virginia. *See* National Council on Teacher Quality, District Map, http://www.nctq.org/tr3/search.jsp .

Second, districts are able to preserve a larger overall number of positions by eliminating the positions with the highest salaries.[44] Given booming student enrollment, challenging student populations, and external demands for accountability, good educational judgment may demand the preservation of as many positions as possible. Such a policy would have the effect of favoring less experienced, younger employees. Third, as discussed above, recently-trained teachers and administrators are likely to be "highly qualified" under NCLB, credentialed to teach English Language Learners, and skilled in integrating technology into the classroom. [45] School districts, thus, have educationally-based reasons for preserving positions held by teachers with these skills, who are often those recently-trained.

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[44] *See generally* Stephen Sawchuk, *Layoff Policies Could Diminish Teacher Reform*, EDUCATION WEEK, Feb. 23, 2009, at 1, *available at* http://www.edweek.org//ew/articles/2009/02/25/22purge-2.h28.html?tkn=VOVFQkmMPmFAz9MFkBfoEnOoE0ZaP0RjEBmw&print=1 (noting "last hired, first fired" policies, in which teachers with lower salaries are dismissed first, "necessitate the cutting of more teachers than seniority-neutral layoff policies, hurting both teachers and students in the process").

[45] For instance, under the Los Angeles Unified School District collective bargaining agreement, teachers trained in high-need subject areas are exempt from layoffs. Agreement between Los Angeles Unified School District and United Teachers Los Angeles (2006-2009), at 146, *available at* http://www.nctq.org/contracts/3.pdf. However, it is unclear whether this provision offers a similar exemption for teachers who are certified to teach English Language Learners. *See* Sawchuk, *supra* note 44, at 1.

Districts must be free to retain the teachers best-suited to help them achieve their goals. Allowing an employee to use the correlation between age and these educationally-based goals to shift the burden of persuasion to school employers in ADEA lawsuits treats this correlation as if it were based on animus and imposes an onerous burden on districts simply seeking to maintain well-staffed schools and to make necessary budget cuts.

b. School districts must be able to reorganize and to reassign staff in ways that accomplish educational goals.

Studies consistently show that the greatest determinant of student achievement is teacher quality.[46] Thus, a district's capacity to raise student achievement is tied to its ability to make employment decisions about its instructional staff.

In recent years, several urban school districts have undergone large scale reorganizations,[47] some

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[46] *See generally* Linda Darling Hammond, *Teacher Quality and Student Achievement: A Review of State Policy Evidence*, EDUCATION POLICY ANALYSIS ARCHIVES, Jan. 2000, *available at* http://epaa.asu.edu/epaa/v8n1/; Steven G. Rivkin, Eric A. Hanuhek, & John F. Kain, *Teachers, Schools, and Academic Achievement*, 73 ECONOMETRICA, 417-58 (2005), *available at* http://edpro.stanford.edu/Hanushek/admin/pages/files/uploads/teachers.econometrica.pdf.

[47] *See generally* Karla Scoon Reed, *Mayor Outlines Major Overhaul of N.Y.C. System*, EDUCATION WEEK, Jan. 22, 2003, *available at* http://www.edweek.org/ew/articles/2003/01/22/19nyc.h22.html?qs=joel_klein+administrative (describing plans to reorganize New York City schools by building a new

spurred by No Child Left Behind's accountability standards and schedule of corrective action. Under NCLB, districts that fail to demonstrate adequate yearly progress for five consecutive years must develop a "restructuring plan" to improve student learning.[48] This plan may include, among other measures, replacing school personnel "relevant" to the failure to demonstrate progress. When replacing staff, school districts must hire teachers who have the training, skills, and talent to accomplish significant gains in student achievement. As discussed above, recently-trained teachers are well-versed not only in instructional strategies that facilitate acquisition of essential skills in the core content areas but also in instructional strategies that facilitate mastery of the skills policy-makers and business leaders expect of students. Given the likely depth of recently-trained teachers' skills and the immediacy of school districts' imperatives to demonstrate improvement, school employers may be prudent to select recently-trained teachers to fill vacant positions. Hiring practices that favor recently-trained teachers may statistically favor younger teachers. If school employers are deterred from making educational judgments about the qualities needed in their workforce based on a fear of

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administrative framework, eliminate unnecessary positions, abolishing community school districts, and adopting a uniform curriculum).

[48] 20 U.S.C. § 6316(b)(7)-(8) (2009). *See also* THE CENTER FOR COMPREHENSIVE SCHOOL REFORM AND IMPROVEMENT, SCHOOL RESTRUCTURING UNDER NO CHILD LEFT BEHIND: WHAT WORKS WHEN? 35-59 (2006), *available at* http://www.centerforcsri.org/files/RestructuringGuide.pdf (identifying strategies for restructuring).

increased ADEA lawsuits, their efforts to improve student performance will be stymied.

In addition to making hiring decisions based on educational judgments about the teacher qualities needed to effect change, school districts must also assign and place teachers strategically within districts to elicit necessary student performance improvements. While recently-trained teachers broaden a district's collective knowledge of cutting edge instructional strategies, experienced teachers play a crucial role in mentoring new teachers and providing building-level leadership. This guidance is especially valuable in schools serving the lowest performing students. Paradoxically, in many districts, where job bidding rights are based on teacher seniority, experienced teachers commonly transfer out of those schools in favor of higher performing schools.[49]

Given the leadership potential of experienced teachers, many districts are seeking ways to transfer

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[49] Charles Clotfelter, Elizabeth Glennie, Helen Ladd, & Jacob Vigdor, *Would Higher Salaries Keep Teachers in High Poverty Schools? Evidence From a Policy Intervention in North Carolina*, 92 J. OF PUBLIC ECON. 1352-70 (Aug. 2007) ("Numerous studies have documented the tendency for the most qualified teachers to gravitate toward schools that serve relatively well-off children, even though salaries are often no higher in such schools."); Joe Smydo, *City District May Offer Bonuses to Attract Teacher to Lower-Performing Schools*, PITTSBURGH-POST GAZETTE, Nov. 6, 2008, *available at* http://www.post-gazette.com/pg/08311/925798-298.stm ("Under many collective bargaining agreements, the more seniority teachers have, the more influence they have over where they teach. Experienced and effective teachers often transfer away from troubled schools, forcing districts to assign newer faculty members to students needing a master's help.").

outstanding veteran teachers to the district's most challenging placements. [50] And where these outstanding veteran teachers are already teaching in a district's most challenging placements, districts are considering ways to retain them in these placements. [51] Policies that involve reassigning veteran teachers to challenging placements (or retaining veteran teachers in these placements) may statistically disfavor older workers due to correlation between years of service and age. These policies, however, are not based on age-based animus but rather are reflections of educational judgments of

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[50] For instance, some districts have incentive programs, discussed more fully in Section II. B. 4. c. below, to entice teachers to transfer to high-need schools and placements. Other districts are adopting policies requiring experienced teachers to transfer to these schools.

[51] Retaining teachers in these placements is often complicated by the fact that many school districts have negotiated seniority-based voluntary transfer policies. *See* JESSICA LEVIN, JENNIFER MULHERN & JOAN SCHUNCK, UNINTENDED CONSEQUENCES: THE CASE FOR REFORMING THE STAFFING RULES IN URBAN TEACHERS UNION CONTRACTS (2005), *available at* http://www.tntp.org/files/UnintendedConsequences.pdf. Under intra-district seniority-based voluntary transfer provisions, teachers with the most seniority are given preference when vacant positions in the district open. Thus, as vacancies arise, teachers with the most experience often transfer to the most desirable placements, typically with high-achieving students. *See* Eric A. Hanushek & Steven G. Rivkin, *Pay, Working Conditions, and Teacher Quality*, 17 THE FUTURE OF CHILDREN 69, 75-76 (2007), *available at* http://www.futureofchildren.org/usr_doc/7_04.pdf; Eric A. Hanushek, John F. Kain, & Steven G. Rivkin, *Why Public Schools Lose Teachers*, J. OF HUM. RES. (Sept. 2003), *available at* http://edpro.stanford.edu/Hanushek/admin/pages/files/uploads/lose%20teachers.jhr.pdf.

student need.[52] School districts should not be deterred from making educationally-based decisions that may adversely affect older workers simply because of a correlation between age and years of service.

c. Incentive programs help school districts attract and retain the right staff.

To improve student achievement and to attract and retain talented teachers, school districts across the country have implemented incentive programs.[53] Because the traditional public school pay structure tends to reward longevity, and because the longest-tenured, most-educated teachers are not always the most effective,[54] many school districts

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[52] *See, e.g.*, Julie E. Koppich, *Using Well-Qualified Teachers Well: The Right Teachers in the Right Places with the Right Support Bring Success to Troubled New York City Schools*, AMERICAN EDUCATOR (Winter 2002), *available at* http://www.aft.org/pubs-reports/american_educator/winter2002/UsingTeachers.html.

[53] *See generally* Jacob Vigdor, *Scrap the Sacrosanct Salary Schedule: How About More Pay for New Teachers, Less Pay for Older Ones*, 8 EDUCATION NEXT 36-42 (Fall 2008), *available at* http://www.hoover.org/publications/ednext/27100089.html; JENNIFER AZORDEGAN, PATRICK BYRNETT, KELSEY CAMPBELL, JOSH GREENMAN & TRICIA COULTER, ISSUE PAPER: DIVERSIFYING TEACHER COMPENSATION (Dec. 2005), *available at* http://www.ecs.org/clearinghouse/65/83/6583.pdf (providing examples of various types of compensation systems).

[54] *See* Darling Hammond, *supra* note 46 (finding teachers' education levels are a weak predictor of student achievement); Dan Goldhaber & Emily Anthony, *Can Teacher Quality Be Effectively Assessed? National Board Certification as a Signal*

have instituted incentive programs to motivate teachers to pursue training related to district goals, to improve student achievement, or to teach in high-need subject areas or in high-need schools.

For instance, NCLB specifically authorized bonus funds for teachers who teach high-need subjects or in high-poverty areas. 20 U.S.C. § 6613(c)(12). Several states have similarly appropriated funds to attract teachers to high-need schools. [55] For many reasons, recently-trained teachers may be more likely to pursue these incentives. First, recently-trained teachers, many of whom are recent college graduates, are more likely to be persuaded by cash stipends. Second, recently-trained teachers have been trained to and expect to

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of Effective Teaching, 89 REV. ECON. & STAT. 134-50 (2007), *available at* http://www.mitpressjournals.org/doi/abs/10.1162/rest.89.1.134?cookieSet=1&journalCode=rest (casting doubt on whether NBPTS certification signals teacher quality).

[55] In 2005, the Alabama Legislature appropriated $725,000 for incentives to attract teachers to schools with a high percentage of students living in poverty. *See* EDUCATION COMMISSION OF THE STATES, ECS STATE NOTES ON INCENTIVE PAY/BONUS PROGRAMS, *available at* http://mb2.ecs.org/reports/Report.aspx?id=592. In 2003, the California legislature authorized the Teacher Recruitment Incentive Program, funded at more than $9 million, to provide incentives to teach in high-need schools. RONEETA GUHA, ASHLEY CAMPBELL, DANIEL HUMPHREY, PATRICK SHIELDS, JULIET TIFFANY-MORALES, & MARJORIE WECHSLER, TEACHING AND CALIFORNIA'S FUTURE: CALIFORNIA'S TEACHING FORCE 2006: KEY ISSUES AND TRENDS (2006), *available at* http://www.hewlett.org/NR/rdonlyres/527179A0-4837-4EC0-8F9D-486FD59DC7D9/0/TCF2006FINAL.pdf. Though short-lived due to budget constraints, the TRIP program was deemed a success. *Id.*

work with ELLs, special education students, and other at-risk populations and are thus often more willing to accept positions in high-need schools. Third, many states, districts, and administrators specifically seek new teachers [56] because, among other things, recently-trained teachers are more likely to share "the view that low-income children are capable of learning at a high level, if taught well."[57] While these incentive-based programs may statistically favor recently-trained—i.e., younger teachers—these programs are not motivated by any intent to discriminate on the basis of age. Rather, these programs aim to attract teachers to hard-to-staff schools and to develop faculty trained to work with at-risk students. Districts must remain free to adopt incentive-based programs, even if these programs are more attractive to younger workers. If plaintiff employees are permitted to rely on an age-based correlation (between receipt of incentives and

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[56] *See* Catherine Siskos, *B is for Bonus – Attracting New Teachers*, KIPLINGER'S PERSONAL FINANCE MAGAZINE, May 2001, *available at* http://findarticles.com/p/articles/i_m1318/is_5_55/ai_73828271 (describing Massachusetts program offering recent college graduates a $20,000 signing bonus to teach math, science, or foreign languages for four years in public schools); Greg Toppo, *Young, Inexperienced Teachers Recruited to New Orleans*, USA TODAY, Sept. 11, 2008, *available at* http://www.usatoday.com/news/education/2008-09-10-new-orleans-teachers_N.htm (noting average age of teachers in teachNOLA, an arm of the New Teacher Project, is 29.3).

[57] *See* Jay Matthews, *Extra-Credit: Are Older Teachers Too Jaded to Be Effective*, WASHINGTON POST, Feb. 19, 2009, *available at* http://voices.washingtonpost.com/class-struggle/2009/02/extra_credit_are_older_teacher.html.

recently-trained teachers) to shift the burden of persuasion in ADEA lawsuits, school employers are likely to be deterred from using incentives to develop the instructional workforce they need.

C. Shifting Burdens To Favor Plaintiffs In ADEA Employment Cases Will Hinder American Schools In Meeting The Demands Of The Twenty-First Century Where Statistical Disparities Arise.

As the job market worsens, employers will see a rising tide of employment litigation.[58] The costs of increased litigation place an onerous financial burden on school employers who are already forced to do more with less. As discussed above, some of the measures schools must take to meet the needs of public school students in the Twenty-First Century pose a risk of creating statistical disparities among employees based on age even when not motivated by discriminatory animus. Accordingly, school leaders will likely fear that taking these measures, even where necessary to support student gains, presents

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[58] As the unemployment rate rises, the pool of potential employment litigation plaintiffs rises as well. At the same time, a drop in the number of available positions exacerbates this effect. In a favorable economy, some laid off workers may be less likely to challenge the circumstances of their termination if they are able to readily find replacement work. The opposite is true when the job market wanes. Given this landscape, employers generally can expect increased employment litigation in response to the depressed job market. *See* John J. Donahue, III & Peter Siegelman, *The Changing Nature of Employment Discrimination*, 43 STANFORD L. REV. 983 (May 1991).

too great a risk of employment litigation that would drain any funds saved by such measures. For example, a school board may think twice about hiring a teacher with a recent ELL certification, who is under 40, knowing that a possible disparate treatment plaintiff may cite the other younger, recent graduates the board has recently hired as evidence of the school board's discriminatory intent.

While the impact of this statistical evidence is significantly less weighty in disparate treatment cases, disparate treatment plaintiffs, like Petitioner in this case, frequently point to statistical disparities to support their discrimination claims. Statistical evidence is commonly consulted in the disparate treatment context. *See, e.g., Furnco Const. Corp. v. Waters*, 438 U.S. 567, 580 (1977) (racial mix of employer's work force is relevant to determining whether hiring decisions were motivated by race in disparate treatment action).[59] In fact, some courts have suggested that in the disparate treatment context, statistical evidence is relevant *even* where it is *not as methodologically sound* as is required in the disparate impact context. *See Bruno*, 882 F.2d at 766-67. Additionally, the Equal Employment

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[59] *See also Garrett v. Hewlett Packard Co.*, 305 F.3d 1210, 1209 (10th Cir. 2002) (employer's practice regarding minority employment, including statistical data relevant to pretext inquiry in disparate treatment case); *Bruno v. W.B. Saunders Co.*, 882 F.2d 760, 766-67 (3d Cir. 1989); *Casillas v. U.S. Navy*, 735 F.2d 338, 342 (9th Cir. 1984); *Minority Employees At Nasa (MEAN) v. Beggs*, 723 F.2d 958, 962 (D.C. Cir. 1983) ("It is well established that statistical data and comparative information concerning an employer's treatment of minorities is relevant evidence in an individual discrimination claim against that employer.").

Opportunity Commission views statistical information as relevant to a disparate treatment claim.[60] Accordingly, public school employers expect inquiries about workforce demographics relating to a particular decision even when facing individual charges of disparate treatment and thus consider demographics when making employment decisions. Undoubtedly, this consideration is, at least in part, a positive intended consequence of employment discrimination law. In practice, however, an unintended consequence will be that schools avoid decisions furthering important educational goals simply because they may lead to a statistical disparity that, while not motivated by discrimination, renders a district vulnerable to litigation imposing intolerable financial and productivity costs.

This hesitance is the kind of "inappropriate prophylactic" measure on which Justice O'Connor based her concurrence in *Price Waterhouse*, 490 U.S. at 274. A rule requiring ADEA plaintiffs to prove that age was the but-for cause of a challenged decision is truest to the plain language of the law, in

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[60] *See* EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, EEOC COMPLIANCE MANUAL: COMPENSATION DISCRIMINATION, USING STATISTICS § 10:3 (Dec. 5, 2000), *available at* http://www.eeoc.gov/policy/ docs/compensation.html ("statistics . . . can help determine whether an individual has suffered from intentional discrimination in compensation"); EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, EEOC COMPLIANCE MANUAL: RACE AND COLOR DISCRIMINATION, CONDUCTING A THOROUGH INVESTIGATION § 15:2 (Apr. 19, 2006), *available at* http://www.eeoc.gov/policy/docs/race-color.html ("Statistics reflecting the employer's general policy or practice can be helpful in determining whether race was a factor in a particular selection decision.").

line with conventional principles of civil litigation, and fairly preserves the balance between employer and employee rights. Even if the Court finds it necessary to shift the burden to defendants in some circumstances, however, requiring plaintiffs to provide direct evidence of discrimination before shifting the burden will better preserve that critical balance. As is demonstrated above, the failure to preserve this balance not only impacts employers, but also those they serve. For public schools, an imbalance of burdens favoring plaintiffs in employment litigation matters will be to the detriment of students.

CONCLUSION

For the foregoing reasons, the decision of the Eighth Circuit Court of Appeals should be affirmed.

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